The Electronic Panopticon: A Case Study of the Development of the National Criminal Records System

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THE military is not the only expanding government activity in the United States. Even though most nondefense programs have been shrinking, criminal justice continues to grow. One of its most rapidly expanding but least noticed activities is the collection, combination, and dissemination of computerized criminal justice records at all levels of government. The past fifteen years have seen the creation, through electronic storage and linkage, of a national system of "hot files"—outstanding warrants for arrest or current identifying information on stolen items like vehicles or securities—and "criminal histories"—identifying information and chronological accounts of an individual's transactions with the police, courts, and corrections agencies.

Routine management of the emerging system is shared by local, state, and federal law enforcement agencies. Data collection and local dissemination of records are state matters; the federal government oversees national dissemination. The FBI, the dynamic center of the system, takes the initiative in major system expansion and innovation.

Although the national criminal records system is a far-reaching expansion of government power, it has received little analytic attention from the scholarly community. This case study is intended to contribute to an understanding of one dimension of expanding state activity in the United States.

INTRODUCTION TO THE SYSTEM

Computerized criminal justice record keeping has grown to immense proportions in the United States since the early 1970s. In 1971 the FBI's computerized clearinghouse of criminal justice information, the National Crime Information Center (NCIC), contained almost 2.5 million records; today it stores or indexes more than 17 million and is expected to handle a million transactions each day by 1989.[1] The other FBI source of computerized

criminal records, the Automated Identification Division System (AIDS), launched in 1973, now contains over 9 million criminal history records and is increasing by 15,000 records per week.[2] In the past fifteen years, central repositories of criminal history information in all 50 states "have been the focus of a data-gathering effort more massive and more coordinated than any other in criminal justice."[3] Forty-four states that responded to a recent survey reported holding an estimated 35 million records (manual and automated) in their central repositories. Thirty-five of the responding states have at least partially automated their records system, and three others plan to do so.[4]

The majority of these records are used for criminal justice purposes—arrests, bail setting, sentencing. But the fastest-growing area of use is employment and licensing.[5] In eight states, including New York, at least one-third of criminal history record requests are for non-criminal justice uses.[6] In some states, criminal histories are more widely available—to landlords and financial institutions, for example.

Although individual states and cities—and the police, courts, and corrections agencies within them—have their own records systems subject to local policy, that decentralization does not preclude a significant federal role. Local and state systems are routinely linked to each other and to the FBI, either through an electronic switchboard called the National Law Enforcement Telecommunications System (NLETS) or through FBI computers. The Comprehensive Data Systems program of the now-defunct Law Enforcement Assistance Administration (LEAA) provided the bulk of funding for starting state systems. Federal standards—or the lack of them—define both users and uses of the data.

The national system of warrants and criminal histories (and perhaps, eventually, investigative files) is not yet complete. But even at this stage, it constitutes law enforcement data surveillance on an unprecedented scale.[7] By the turn of the century, most of the estimated 36 million Americans with arrest records will be included in what is, in effect, a national data base constructed from networks of local and federal data bases.[8]

It is possible to visualize circumstances in which computerized criminal records systems would be efficient, effective, and broadly accountable. Such systems might include a national data base, linked to state and local law enforcement agencies, containing complete and accurate criminal history records on a relatively small number (probably about a million) of serious, multistate offenders—as proposed, for example, by Kenneth Laudon.[9] This file would be subject to continuous public oversight, available only for criminal justice uses and for limited high-security job checks, and subject to

dissemination restrictions in accordance with state laws. Supplementing the national criminal history system would be separate state systems covering a wider range of offenders and tightly regulated as to file content, data quality, and access to records. State and federal warrant systems would regularly be audited for timeliness and accuracy, and national dissemination of warrant information would be limited to felonies. Penalties for violating system regulatory standards would be enforced.

The emerging system does not remotely resemble that tidy picture. Its deficiencies are myriad and complex. This article focuses on two characteristics of the system's political and organizational structure that, taken together, have potentially grave consequences for individual liberties and social justice.

1. State recordkeeping, the source of all data in the system except for those on federal crimes, is essentially unregulated, resulting in inaccurate and incomplete criminal histories, "wrong warrants," and widespread use of records outside the criminal justice system.

2. Central coordination and expansion of the system perpetuates the defects of state systems through national dissemination, permits overinclusiveness of files and undiscriminating access to records, and seeks to increase the use of system data for purposes only tenuously related to crime control.

One of the difficulties of anticipating and responding to the problems of the criminal records system is the complexity of its structure. On the one hand, criminal justice falls outside the centralized federalism characteristic of the U.S. state in the post-World War II period. Law enforcement is still relatively free of national control. On the other hand, federal initiatives have increased since the late 1960s—research and evaluation grants, new federal crimes, federal participation in drug and organized crime investigations. Modern criminal justice recordkeeping reflects both the traditional local character of law enforcement and the burgeoning national presence in crime control.

We are accustomed to thinking that there are characteristic advantages and disadvantages of the U.S. state structure of multiple centers of power. Local responsibility for some functions maximizes participation and accountability, but local interests may promote inequality or repress fundamental rights. National power can impose uniform standards for distributing rights or benefits but may prove unresponsive or tyrannical.

This paper argues that the emerging national criminal records system manifests many of the disadvantages of both local and national control while providing few of the advantages of either. The combination of disadvantages heightens the importance of controlling and restructuring the system, but the complexity of the allocation of powers among various sites renders control extremely difficult.[10]

These problems have not gone completely unnoticed. Initial concerns about criminal justice recordkeeping flowed from traditional civil libertarian perspectives. In the early 1970s, senators, scholars, journalists, and a few law enforcement officials worried about the consequences for due process and the right to privacy of an essentially unregulated computerized criminal records system that could reach into any police precinct and would be accessible to employers and the military, as well as to law enforcement officials. They pointed out that such a system would, in the words of U.S. District Court Judge Gerard A. Gesell, "inhibit freedom to speak, to work, and to move about in this land."[11] Robert Gallati, then director of the New York State Identification and Intelligence System, testified at Senator Sam Ervin's 1971 hearings on federal data banks that "there is an absence in American law of institutional procedures to protect against improper collection of information, storage of inadequate or false data, and intragovernmental use of information for farreaching decisions about individuals outside or inside the organization."[12]

The protestations of the early 1970s now seem merely ritualistic. Nothing more than a general, one-paragraph legislative exhortation to keep criminal histories private and secure resulted from them, and that was intended to be temporary.[13] As the scope and intrusiveness of data surveillance in criminal justice mushroomed, resistance to it dwindled. The Privacy Act of 1974 (5 U.S.C. 552a), which establishes standards for records on individuals maintained by federal agencies and some federal contractors, excluded specific provision for law enforcement files "until such time as more comprehensive criminal justice legislation is passed."[14]

That time never came. Although hearings were held on several criminal justice privacy bills, none ever passed.[15] Finally, in 1975, LEAA issued administrative regulations requiring that state and local systems receiving federal funding establish procedures to ensure the accuracy and completeness of records. Revised a year later to meet the objections of law enforcement officials, the regulations are virtually toothless.[16] They acknowledge, for example, that maintaining complete criminal history records is "administratively impractical . . . at the local level." They do not even attempt

to limit dissemination of records to law enforcement personnel, and states are not prohibited from sharing their criminal justice computers with non-law enforcement agencies. It is no wonder that a consultant study in 1977 found little compliance with the regulations.[17]

State policies as a whole are no more protective. Few states have laws requiring timely reporting of data on a person's contacts with the criminal justice system; only eleven states require annual audits of their records.[18] Most states now authorize access to criminal history records for non-criminal justice uses, some—the "open record" states—to anyone willing to pay a modest fee. Litigation over the use of criminal records has generally been limited to the consequences of mistakes, and a privacy theory that would limit state power to disseminate records has been explicitly rejected by the U.S. Supreme Court.[19]

The problems of regulation and control are serious in their impact on the due process rights of individuals. But the effects of the national criminal records system may go even farther. The second critical danger is that the centralization of control over the system will render it a tool of discipline more generalized than the democratic ideal of targeted, publicly accountable administration of justice. Michel Foucault's use of Jeremy Bentham's model prison as an image of the "machinery of power" is apt in this case.[20] Bentham's Panopticon was a circular prison with individual cells around a central tower so that a single warden could observe the movements of all inmates at all times. With the national computerized system, the entire function of crime control, not just the prison, becomes a "panoptic schema," with the record a surrogate for the inmate and all of law enforcement as warden. Such an image has no boundaries; the warden becomes boss and landlord and banker, too. And then we are all enclosed in an electronic Panopticon.

It is too early to assess systematically the full range of effects that the developing national criminal records system will have on individuals, on the social structure, and on future developments in criminal justice. But anecdotal revelations of system operatives and public interest lawyers around the country are telling. Later in this paper, after discussing the structure of the system, I review some evidence of the Panopticon's dangers.

Identification of the absence of regulation and the centralization of control as key issues in the system's development suggests two groups of questions for analytic investigation:

1. What are the principal forces that have acted to keep the system free of meaningful regulation and to maintain centralized control? How have those

forces prevailed, even as the negative effects of the system have become increasingly apparent?

2. Why was initial opposition to the system's expansion and centralization so ineffective? Why did it fade? Why is there now so little attention to this area of actual and potential social control?

Most of the scant literature on computerized criminal records does not address these kinds of questions. The major sources all focus on the growth and effects of criminal history systems, primarily federal, and do not include the hot files as part of the totality. For example, David Burnham, in *The Rise of the Computer State*, describes the FBI criminal history repositories to illustrate the reach of linked data bases, and Gordon Karl Zenk, in *Project SEARCH*, traces the history of the bureaucratic battle between LEAA (and its subcontractor, Project SEARCH) and the FBI over control of the national computerized criminal history system.[21] There has been some government research on data quality in criminal history records, most notably a 1982 Office of Technology Assessment (OTA) study that emphasized omissions in criminal history records.[22]

The most important analytical work in this area is Laudon's recent book, *The Dossier Society*, which examines the social impacts of the national criminal history system and compares state systems.[23] Laudon concludes that institutional factors (a strong executive, other computer projects in the government) are as significant as environmental needs (high crime, population growth) in explaining state variations in adoption and use of computerized criminal history systems. He also examines the relationship between a number of variables (crime rate, income, federal funding) and non-criminal justice use of criminal history records systems.

Even Laudon does not explore the political and bureaucratic forces behind the development of the system as a whole—state and local files and warrant records as well as criminal history data bases. This article defines the system as including linked records from all sources and of whatever kind and updates the descriptive picture of earlier literature with current (1984-85) examples of proposed and actual expansions of the system. It also goes beyond existing critiques, which focus primarily on the system's civil liberties consequences for individuals, to raise questions about its implications for social and political structure and methods of social control.

The next two sections of this article develop the raw material of the case study, describing the system's current scope and reviewing its unregulated character and central policy control. The following section analyzes the forces

that contributed to its development and examines the lack of an effective force for system control.

Along one dimension, the relatively unchecked expansion of the national records sytem can be understood as the product of pluralist political influence and bureaucratic imperatives. At the same time, along another axis, I argue that one must understand the uneven contest between system proponents and opponents as a battle of political symbols. The symbolic images at the disposal of criminal justice officials helped embed and legitimate the criminal records system. The ideological modes of discourse available to system skeptics, by contrast, were relatively indeterminate and readily turned against themselves. The unevenness of this symbolic contest suggests some conclusion about the dynamics of expanding social control policy in the 1980s.

SOME DIMENSIONS OF THE SYSTEM

To understand the reach of the national criminal records system and the distribution of government authority over it, one must look beyond information on its volume, reported above, to the linkages of the system and their implications. Consider, for instance, one way in which the FBI's two theoretically separate computerized criminal history files are combined. The FBI's Identification Division includes a partially automated criminal file, in existence for 50 years, which holds fingerprint cards and criminal histories on 23 million people, sent to it from the states. And NCIC, the FBI's computerized criminal justice information clearinghouse, now contains the Interstate Identification Index (usually called Triple-I), the locator for about 10 million criminal histories stored in 20 states and available by computer to 64,000 law enforcement agencies around the country. The Identification Division file is directly available to law enforcement agencies and authorized employers and licensing agencies only by mail, and Triple-I records are supposed to be exchanged between states only through NLETS to maintain local control. But NCIC now accesses the automated records of the Identification Division in order to respond electronically to NCIC users when they request criminal histories from the 30 states that do not yet participate in the Triple-I. So some information that state and local law enforcement could not get quickly from the Identification Division, they can now get almost instantly through Triple-I. And the FBI is running state records through its computer, doing indirectly what it was prohibited from doing directly by Congress and the attorney general a decade ago.

Other connections of FBI files are being made. An inquirer to Triple-I is now notified not only about what state has a complete criminal history on the record subject but also about any outstanding warrant information that the FBI may hold.[24] Just as this article was going to print, the *New York Times* reported that NCIC's advisory board had recommended that federal, state, and local law enforcement agencies be permitted to exchange information on the whereabouts of anyone under investigation, whether or not charged with a crime; the board also proposed that NCIC users be given access to the files of the Securities and Exchange Commission, the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration, and the Passport Office of the State Department. The developing technology of electronic fingerprint image comparison will soon enable California, New York, and the FBI to match a job applicant's fingerprint or a "cold print" found at the scene of a crime with computerized fingerprint files in the Identification Division.

The likelihood of political abuse of FBI files and the bureau's access to the files of others seems greatly reduced since the days of J. Edgar Hoover. But the age of computers has extended the operational opportunities for abuse in a political "emergency." The automated files of NCIC and the Identification Division could be sorted by Hispanic or Arabic surname, for example, or for drug convictions or arrests for participating in demonstrations. Matching other data bases like taxpayer or welfare records with criminal history files is also made easier by central access.

As the reach of information collection broadens, so does authorization of access to records. Virtually everywhere, law enforcement agencies have access to the national system without reservation. And the range of employers or licensing agencies authorized for access to both state and federal criminal records is growing rapidly. An examination of state experience reveals that, although some states are making an effort to improve data quality—requiring audits, for example—record systems are becoming more and more open.[25]

New York, for instance, allows or requires government agencies, schools, day care programs, museums, hospitals, banks, and law enforcement agencies, among others, to screen criminal records for employment purposes. Those who seek licenses for such enterprises as games of chance, guns, check-cashing operations, securities firms, and funeral homes as well as insurance adjustors, are screened. In all of these cases, nonconviction data may be disseminated—that is, information about arrests that are pending or charges that were dismissed or for which the defendant was acquitted.

Requests for record checks for non-criminal justice purposes jumped from about 100,000 in 1979 to an estimated 209,000 in 1984.

California makes even greater use of record checks for employment and licensing. Screening is authorized for the following occupations, among others: auto mechanic, barber, cosmetologist, optometrist, liquor store owner, shorthand reporter, pest control employee, TV repair person, real estate broker, and notary public.[26] If a "compelling need" is demonstrated, records may also be released to out-of-state district attorneys; to the inspectors general of most federal agencies with any regulatory powers; to the Postal Service and the Veterans Administration; to state hospital officers; to security officers for a number of state and local agencies; and to many more. As of 1983, more than 3.7 million state records had been reviewed for employment purposes. Fred Wynbrandt, head of the NCIC Advisory Policy Board, says of the expansionist tendency in California—where access has gone from public agencies to youth-service organizations to banks—"It just crept and crept."

Employer use of federal records is more restricted. The FBI is limited by federal legislation to the dissemination of criminal history records "for the official use of authorized officials of the Federal Government, the states, cities and penal and other institutions.'[27] Although this excludes private employers, it means that many public jobs, and most at the federal level, are subject to careful and extensive screening, particularly where a sensitive position is involved.[28]

Federal law may override state privacy standards to authorize the screening by federal agencies of state and local records for employment purposes. There, too, authorization is widening, with a growing tendency to cover menial as well as skilled occupations. Perhaps as a reaction to the threat of terrorism, the U.S. Customs Service has now issued emergency regulations allowing record checks for airport employees, including baggage handlers and members of the ground crews; and the secretary of transportation has submitted legislation that would make that procedure permanent.[29] The proposed Intelligence Authorization Act of 1987 would allow the Department of Defense, the CIA, and the Office of Personnel Management access to local records for security clearances, which now cover 4 million people.[30]

PROBLEMS OF THE SYSTEM

Defenders of the national criminal records system usually justify its reach (defined both in terms of the inclusiveness of its subjects and the data included in it) by alleging that it provides significant benefits in the war against crime.

This section argues that those benefits are slight and are outweighed by serious deficiencies, some of which may actually give rise to crime. The section then examines some consequences of inadequate regulation—errors and omissions in records, possibilities for abuse, and the access to records of many outside the criminal justice system. It concludes with a more speculative discussion of some of the implications of national, centralized control of the system.

The System's Ineffectiveness as Crime Control

For the criminal records system to reflect a proper balance between the state's legitimate interest in criminal law enforcement and the individual rights of record subjects, it must be shown to improve the quality of information that decisionmakers need to control crime. For assisting an arrest decision or aiding a police investigation, the availability of warrant information from other states is theoretically very useful. But that usefulness is limited by several problems. Many of the warrants in the national system contain erroneous identifying information, reflecting local mistakes. They may have been discharged locally but not removed from NCIC. The lack of fingerprint identification for most warrants results in cases of mistaken identity. Finally, the file is not comprehensive since the contribution of warrants to the NCIC Wanted Persons file is totally voluntary and NCIC charges a fee for each warrant entered into the system. As a result of these problems police tend to use NCIC warrants only when they are investigating a very serious crime or need an excuse to pick up someone they suspect of a current crime but have no evidence on which to base prosecution. The availability of the information neither improves the reliability of decisions that would be made anyway nor provides a sound basis for making new ones; instead, it broadens the range of situations in which policy discretion can be exercised, an outcome outside the declared objectives of the system.

With criminal histories the problem goes deeper, to the basic justification for making the data available. The traditionally local quality of criminal justice is deemed appropriate for tailoring decisions about the use of society's most coercive power over individuals to local needs and culture. To introduce into the criminal process of one jurisdiction data reflecting the activities and standards of another subverts that value. And records obtained through Triple-I may be meaningless for most common needs. A judge's determination of what to take into account in sentencing, for instance, becomes merely more complicated when the record from another jurisdiction is

considered. Police standards vary greatly from state to state, even from city to city. "In Oakland [California], for a black male to have five or six arrests is unremarkable," Laudon says. "Busting them is part of controlling the streets."[31] And police, except in "stop-car" situations, do not usually need another state's files, at least not instantly, to conduct investigations; 70 percent of offenders commit crimes in only one state.

Law enforcement officials, justifying large system expenditures, publicly cite dramatic examples of the one that didn't get away because of the computers' fancy footwork.[32] But privately they most often justify computerized criminal history records in terms of internal office efficiency, not as investigative tools for police or management information for judges. Laudon has concluded that any assertion that the billion dollars invested in reporting systems thus far is cost-effective in crime control terms is based only on "a wing and a prayer." "The empirical relationships are unproven, maybe irrelevant," he says.

Crime prevention, not capture or containment, is the issue when employers or licensing agencies use criminal records. Recent experience induces skepticism as to the cost-effectiveness of records searches for ferreting out dangerous criminals. The results of criminal records checks on current or prospective New York City child care workers may be indicative. At last count, record checks had been run on 21,778 people.[33] Of these, 152 (0.7 percent) were found to have records for such offenses as assault, robbery, drug offenses, or possession of a weapon; 14 (0.06 percent) were for sexual offenses (rape, sodomy, sexual abuse), and 4 (0.02 percent) were for endangering the welfare of a child. Almost half of those with records were custodial staff; many of the records were very old. The seven people in the Bronx day care centers who actually committed the crimes that led to the screening requirement would not have been found if the system had gone into effect before the incidents of abuse; none of the seven had a record.

The Effects of Absence of Regulation

Criminal records are full of mistakes. Although there are probably, in fact, fewer errors in computerized records than there were in manual files, mistakes have more impact now because they travel farther, are seen by more people, are copied and recopied, and have more uses. The national system is only as accurate as the local and state law enforcement records that constitute it.

One common problem is the incomplete criminal history record. What a particular record means is unclear unless it indicates how an arrest was disposed of—by acquittal, dismissal, or conviction. In fact, convictions are the exception. A 1983 report by the U.S. Bureau of Justice Statistics looked at data from several states concerning arrests for serious crimes and found a variation from 39 percent resulting in conviction in Pennsylvania to 56 percent in New York.[34] Employers seeing an arrest without a disposition, however, are unlikely to take the risk that the job applicant is among the group not convicted.[35]

Both state and federal criminal history files (computerized and manual) contain many arrests without dispositions. The OTA study found, for example, that only about two-thirds of a state's records, on the average, contained timely accounts of how the case was disposed of. Eight states reported that less than a quarter of their records were complete.[36]

No systematic review has been done of how many or what kinds of people have lost or been denied jobs as a result of records that failed to report a dismissal or acquittal. Anecdotal evidence suggests that the impact is felt by professionals and workers in a wide range of occupations. Two California teachers successfully sued the state for disseminating to the education licensing agency records that failed to show that criminal charges brought against them had been dismissed. Their injury included not only many months' delay in granting their teachers' licenses but dismissal by their local school boards from the temporary jobs they had held.[37] Presumably most people injured by incomplete records do not go to court; two students denied jobs because of inaccurate traffic offense reports told me that they no longer applied for jobs where record checks were likely. People with records in rural areas are probably most vulnerable; rural courts are said to be slowest to record their dispositions. Blacks may be more vulnerable than whites. Some research has found that blacks are more likely to be released after arrest; so the probability that an incomplete record conceals a dismissal may be higher than for whites.[38]

Error is not limited to criminal histories; it extends to other types of files. Cases of mistaken identification of warrant subjects are springing up all over the country. Plaintiffs in Louisiana, California, New York, Michigan, and Massachusetts, to name a few, have sued police for wrongful detention of up to four months.[39] Typically, the victim is black or Hispanic (in nineteen of the twenty cases I have examined), has a relatively common name, and is picked up in a traffic offense or border check on the warrant of someone charged with a serious offense. Sometimes the problem is the failure to remove a warrant

that was in error in the first place; a Boston plaintiff was jailed because the police had not corrected the report of a stolen car that had, in fact, been borrowed by a relative. Recent FBI audits have revealed that at least 12,000 inaccurate or invalid reports on wanted persons alone are sent each day by state and local law enforcemnet agencies to the NCIC.[40]

Once made, these errors are hard to correct—as law enforcement officials are the first to admit. Once a victim of mistaken identity has been arrested on a "wrong warrant," his or her name goes into the FBI's Triple-I (assuming that the crime charged is a felony and that the arresting state participates in the program) and the arrest record into the state repository, from which it may be sent to requesting law enforcement agencies in other states even if the mistake in the original warrant file was corrected. A court order—and, therefore, the time and expense of consultation with a lawyer—is usually required to alter the record, and even that does not correct the mistake in the other locations to which it has traveled. If a criminal history is released to an employer or licensing agency, there is no guarantee that it will not get into other hands and become untraceable.

Data quality is not the only operational problem of the system; abuse of record dissemination is another. Sometimes the prevention of crime becomes the justification for an illegal use of the system, such as getting access to Triple-I or state records for unauthorized employment checks. In Louisiana, for example, despite state legislation calling for "the privacy and security of information" contained in the state repository, it became common practice in New Orleans for employers needing an unauthorized record check to obtain it through personal contacts with people who had access to records in a law enforcement agency.

The abuse may also stem from efforts to track possible political dissent. Revelations of police spying at all levels of government have continued into the 1980s.[41] Personal financial gain is sometimes the motive for abuse of the files; criminal history system officials in both California and New York recount anecdotes of information sold by police to political campaigns, disgruntled spouses, and landlords.

Potential Effects of Central Control of the System

Significant regulation of state data collection and dissemination seems unlikely in the near future. State administrators say they cannot afford it, and both they and FBI officials maintain that the Constitution precludes a larger federal role. Even if the system were more tightly regulated, its centralized

control would retain the potential for contributing to the Foucaultian "machinery of power." Two tendencies that flow from the system's centralized character are suggestive of some of its actual or potential effects:

In an age when information is power and more is almost always better, the dynamic of system expansion is very powerful.

At times when the state is predisposed to using its power to regulate personal behavior, the system will reflect concerns going beyond crime control to larger political priorities.

Spreading access to records suggests the system's dynamic tendency to expand. In 1984 the FBI made at least six significant proposals for either expanded access to or additional information for its NCIC files.[42] It has also proposed a cross-search (where an inquiry of one file automatically triggers a review of others) of three of the NCIC files, which would effectively combine records. As the number and variety of records grows, along with the amount and kind of data contained in them, judgments about what persons and behaviors are appropriate subjects for data surveillance become less and less discriminating. Similarly, there is less and less resistance to expanding the range of authorized users of the system. When access to records cuts across many jurisdictions, different standards—some mandated by law—for the interpretation of data and judgment as to their significance apply.[43] Lines of political accountability become blurred, and constitutional concepts like the separation of powers and federalism are so diluted as to be meaningless.

Recent proposals for new files to be added to NCIC also illustrate the system's expansionary tendency. In 1983 the NCIC's Advisory Policy Board considered setting up several new files of investigative data, including a file on people not wanted for or suspected of a specific crime but thought by NCIC users to be involved with terrorism, organized crime, or narcotics.[44] That file was to include investigative information—not matters of public record like arrests or convictions—on people "known to be, believed to be, likely or may be" associated with a drug dealer, whether or not they were suspected of participating in or knowing of the dealer's illegal activities.[45]

Although the FBI tabled that idea in response to congressional concern and press attention, a year later the NCIC's Advisory Policy Board approved the testing of an inclusive new investigative file, the Economic Crime Index (ECI). It would include such information as name, physical description, address, phone numbers, Social Security and license plate numbers, bank account numbers, and names of associates of people suspected of white-collar crimes, particularly large-scale bank and securities frauds. The ECI would

eventually allow the Justice Department, other federal agencies with investigatory authority, and all 60,000 NCIC users to exchange information about white-collar crime suspects.[46] The FBI has not said what crimes it would be investigating or defined the term "associates" or indicated what standard would be used for index entries. Presumably anyone who worked with a suspect could be included in the index, and surely all family members and close friends would be. (Although former Deputy Attorney General D. Lowell Jensen stated in early 1985 that the index is being set up, then-FBI Director William H. Webster responded to the privacy concerns of the House Subcommittee on Civil and Constitutional Rights by saying that "the FBI is considering several alternatives." The test has apparently been delayed.)

The ECI proposal is related to another innovation in federal law enforcement that illustrates the proposition that centralized, federal control may supplement the law enforcement justification for the system with more general political imperatives. In April 1984, the four federal bank regulatory agencies and the Justice Department entered into an agreement to record suspicions of bank fraud in an FBI computer (not part of NCIC) to enable, among other things, the earliest possible Justice Department "assessment and evaluation."[47] This expansion of authority for bank fraud investigations will give federal law enforcement personnel access to bank records before the depositors are even reasonably suspected of a crime. No evidentiary standard need be applied by the regulatory agencies when they make a referral, and the new system applies equally to suspicions of individual teller theft and massive frauds that may lead to a bank's collapse.[48] (In fact, the overwhelming majority of suspected frauds reported to the Justice Department in a test of its referral form were for what the Attorney General's Bank Fraud Working Group considered the "smaller" crimes of suspected losses not involving bank insiders and worth less than $10,000.)

Fishing expeditions of screening child care workers and bank depositors will surely yield a catch of some sort. But record checks are probably less effective at reducing crime than careful non-criminal background assessments of job applicants and training that alerts day care administrators to spot abusive tendencies in employees. And greater regulatory vigilance in financial institutions would probably prevent more crime than would giving the FBI access to bank records on the basis of the examiner's first hunch. The House Subcommittee on Commerce, Consumer, and Monetary Affairs, after studying four major bank failures caused by insider fraud, concluded in 1984 that "in each of these failures, the appropriate Federal bank regulatory agency had ample advance warning of unsafe and unsound banking

practices—particularly insider misconduct—prior to insolvency, but failed to take prompt and effective remedial action."[49]

But the Reagan administration is not concerned that law enforcement may be driving out good program management. Screening has latent but powerful aims beyond the reduction of crime, as illustrated by the dragnet of child care workers and the expansion of federal law enforcement authority over financial institutions. The Reagan administration is willing to bear the social cost of subjecting millions of bank depositors and their friends to the perpetual risk of criminal investigation in order to convey the message that surveillance and punishment are government activities preferable to business regulation.

EXPLAINING THE PANOPTICON

The coercive power of the criminal law can enforce and shape the political system. Its application and influence are therefore important subjects of inquiry for social scientists. The developing criminal records system contributes to a trend, begun in the Jacksonian period in the United States and 50 years earlier in Europe, of rationalizing punishments and reducing their harshness and visibility while making them more pervasive.[50] Having eliminated public hangings and legal torture, the United States now maintains an estimated 3 million adults under some form of correctional custody—prison or jail, probation, or parole.[51] To respond to the latest developments in this trend, we must understand their sources. This section explores the reasons for the criminal records system's lack of regulation in a regulatory era and its central control in a policy area where localism has been a guiding imperative.

Several perspectives are necessary to explore the centralizing dynamic and the failure to regulate, on the one side, and the lack of effective resistance to those tendencies, on the other side. Pluralist political influence expressed through public concern about street crime provided a general license for developing more efficient law enforcement measures, but it does not explain the development of uncontrolled national data surveillance. Similarly, bureaucratic imperatives such as the "vigor to expand" and interagency competition contributed to the generous funding of the system and expansion of its uses, but they did not determine its lack of regulation.

Neither of these perspectives tells us much about how government actors have used public concern and bureaucratic imperatives to bring us the electronic Panopticon. To understand policy strategy in the development of the criminal records system, we must look to symbolic politics. Criminal justice officials have been able to manipulate traditional law enforcement

symbols of public protection, modern visions of the unmitigated good of unlimited information, and broader images of the U.S. political system to support an unregulated crime information system controlled by the national law enforcement agencies. By contrast, system opponents—generally civil libertarians—have been able to rely only on largely indeterminate legal rules and symbols that could often be invoked with equal effect by proponents of the system. I suggest in what follows that the competition of symbols has played a critical role in policy development in this area.

Before beginning, I wish to address one potential criticism of the analytic task of this section. I analyze the dynamics of the development of the electronic Panopticon as if it were explicable by internal and external systemic forces. Some of those who work closely with the national criminal records system deny that it is either a system or a national policy and maintain that it therefore poses no coherent or determinate threats to civil liberties or social justice.[52] Many researchers in this area complain, in fact, of insufficient data collection on the local level and see the principal policy issue as the need for greater comparability among local and state criminal history systems. Local law enforcement officials and legislators often see their state's crime control agenda as technically and politically discrete and self-determined.

It is true that geographic and jurisdictional decentralization of parts of the system make its growth and structure difficult to explain simply or with a single policy model. State criminal justice information policies vary in both nature and source and therefore do not uniformly shape the basic materials or activities of the national system.[53] Even a major part of central coordination—the NCIC's management of the Triple-I and the automated hot files—is subject to the diverse policy influences of the different states since the FBI must accommodate itself to some degree to the wishes of the NCIC Advisory Policy Board, which is made up of state law enforcement officials. In addition, the system affects all branches of government and operates at every level, from the police precinct to the U.S. attorney general's office.

To call the system diffuse and inchoate is not, however, to mitigate its effects or to deny its evolution. The forces suggested earlier in this paper (with state variations, of course) determine the development of a national course of action even without explicit or comprehensive license. By all but the most static and formal definitions, that constitutes the creation of policy.[54]

Forces for Central Control

Viewed from a long historical perspective, a records system whose expansion and political direction is centrally controlled is perhaps to be expected, given the forces for standardization and comprehensiveness in modern states. But in the short run, it is quite surprising, given the vogue of the New Federalism among conservatives and the traditional bias toward local control of law enforcement. What influences have prevailed over the latter imperatives to provide central control of criminal records?

Mainstream, instrumental policy models would be most likely to find explanations in policymakers' rational, causal response to serious crime.[55] Corollary propositions would be that centralization improves the efficiency of criminal justice recordkeeping and responds to public doubts about law enforcement efficiency and effectiveness.

There is some support for the "crime problem" hypothesis in the initial creation of computerized files at federal and state levels. NCIC came into being in 1967 when serious property and personal crime as reported by the FBI had been increasing for several years and had become an issue in local and national political campaigns.[56] Laudon confirms the empirical hypothesis that high crime rates (along with population and incarceration rate) are statistically associated with the early adoption of computerized criminal history systems at the state level.[57] But the continuing development of the dynamic central core of the system cannot be explained by rising crime. System development at state and federal levels continued throughout the 1970s and into the 1980s despite the drop in reported crime at the turn of the decade. In fact, the big push to automate name and fingerprint searching in the FBI's Identification Division occurred as rates of reported crime declined in the 1980s.[58]

If public support for central control over records exists, I have not been able to identify any direct link between general concern over crime and the development of the computerized criminal records system. None of the criminal justice officials interviewed for this article attempted to maintain that there was a traceable, articulated link between public fear of crime and proposals for a national information system; a few did mention pressures from interest groups that either represent criminal justice or monitor it for "good data" on "career criminals."

What V. O. Key would call a "permissive consensus" certainly exists for taking strong measures to reduce traditional crimes like murder, rape, and robbery.[59] National polls taken during the 1970s and 1980s consistently show

that most Americans think too little is spent on crime control, and a majority of respondents often think courts are too easy on offenders.[60] But these views do not necessarily indicate support for either the inclusiveness of a national system or the control of information by state and federal authorities.[61] Furthermore, the traditional American antagonism to concentrations of power appears to have intensified since the late 1960s, with polls consistently showing a loss of faith in the major institutions of American society, including government.[62] Revelations in the 1970s of FBI spying have surely contributed to this crisis of authority.

A more useful perspective on the pressures for central control of the system can be found in the interacting forces of federalization and elite influence in the administration of justice. Although criminal justice is still primarily a local function, national involvement has grown steadily during the twentieth century. In the first decade, the FBI (then called the Identification Bureau) was created, and the U.S. Children's Bureau developed the first juvenile justice standards; national campaigns against the scourges of drugs and organized crime began in the 1920s and reappeared in the 1950s; and starting with the "Lindbergh law" against kidnapping, federal jurisdiction over criminal activity has expanded continually, most recently through the Comprehensive Crime Control Act of 1984.[63] Elite influence has shaped crime control policy through such developments as Supreme Court definition of the rights of defendants and Progressive reform of police practices.

The two tendencies have often overlapped. Of particular significance is President's Commission on Law Enforcement and Administration of Justice. Chaired by a former U.S. attorney general and including the president of Yale and a future U.S. Supreme Court justice, among others, the group issued a report in 1967 that provided the initial push for a national criminal history system and lent authority to the legislative proposal that created LEAA.[64] That agency set up state repositories, funded the electronic pathways between local law enforcement and the FBI, and challenged J. Edgar Hoover's 50-year dream of a comprehensive national crime information system, giving rise to a decade-long struggle between the two agencies over resources and control of the computerized criminal history system.[65]

The continuing development of the criminal records system no longer commands the attention of blue-ribbon commissions or senators. But elite influence continues in the federal courts' support of FBI authorization of wide dissemination of criminal records. And it can be seen in the aura of the system's technology and its application in organizational settings. The recent literature analyzing the social and political implications of computer use in

government is helpful in understanding this dynamic. This initial view of computers as apolitical tools for rationally improving services to people has been supplemented by the conclusion that computer applications in government constitute a kind of "reinforcement politics" that serves the values and status of those in charge.[66] The development of the criminal records system bears out this perspective. Early endorsements of central control of recordkeeping are reinforced by the technological superiority of the FBI, the new class of information managers in the FBI and the state record repositories, and the increased capacity of criminal justice officials to provide technical support to other government agencies and to mayors and governors. This patina of technical expertise seems to exercise a persistent, relatively persuasive pressure for central expansion of and innovation in the system.

Opposing Regulation

The mainstream rationalist perspective helps to explain the lack of regulation at the state and federal levels of file size, data quality, and access to the system. To monitor data collection and dissemination in many thousands of jurisdictions is a monumental administrative and fiscal burden. To impose a comprehensive federal regulatory scheme also challenges legislative initiatives already taken in most states and therefore raises political issues. From the criminal justice official's point of view, these concrete costs of regulation weigh heavily against the intangible benefits of protecting the privacy and social justice interests of an undetermined number of present and past criminal defendants, the majority of whom are poor and powerless.

Predictable bureaucratic imperatives have also determined the lack of regulation. The pressure for continuous and impersonal rationalization of program activities and the Weberian "vigor to expand" help explain the seemingly limitless discovery of new uses for the criminal records system—for finding missing children, for example, or for reinforcing bank regulatory activities—and the unwillingness to set limits on that process. Agency competition is relevant, too; LEAA abandoned its early support for comprehensive regulation of the criminal history system as soon as the battle with the FBI heated up. As for passivity about regulating state systems, the "budgetary feast" of LEAA grants for criminal justice information systems development simply overwhelmed most initiatives for developing a regulatory scheme.[67]

Perhaps most important in this context is the relative power of the symbols manipulated by proponents and opponents of regulation in both their

organizational relationships and their representations to Congress and the public. Murray Edelman's analysis of politics as a symbolic form is useful here.[68] He asserts that most controversial or important political acts serve as "condensation symbols," that is, evoking through an act or position memories and emotions that affect the observer more than the objective consequences of what has just occurred. The Constitution is therefore seen as important more for its condensation of human dreams and fears than for the rational appeal of its provisions.[69] Administrative agencies commonly rely on symbolic politics to rally support for their programs, sometimes creating or inflating an intangible political threat to legitimize their own aggrandizement; Edelman cites the FBI's traditional posture on the communist "conspiracy" in the United States.[70]

The conflict of system managers who opposed regulation and civil libertarians who sought it may thus be seen as a competition of symbols. Unable to demonstrate the crime control effectiveness of an inclusive criminal records system controlled by the FBI, criminal justice officials now rely on various images of the police role to protect their autonomy. Police serve as mediators between the community and the law, empowered with broad discretion for the protection of the community in an emergency.[71] To monitor information for police use is to challenge the protective discretion that is the essence of the law enforcement role. To impose management checks is just as threatening. When legislation was proposed that would have shared policy control of the system at the federal level with private citizens and officials outside the Department of Justice, former FBI Director Clarence Kelley responded by defending the autonomy and professionalism of law enforcement, rather than by addressing the objective consequences of the proposal.[72]

One of the most powerful symbols law enforcement has at its command is that of federalism, the sharing of political power between national and local governments. Defying the evolution since World War II of centralized federalism, where most domestic policy problems have been seen as calling for national remedies, criminal law enforcement has continued to be largely a local function guided by state law (except where federal crimes are at issue). The imposition of detailed, comprehensive privacy and security regulations would surely be a complex administrative task and would alter local political culture to some degree in every state. But law enforcement officials at both state and federal levels cast the issue in constitutional terms, describing the prospect of audits, logs, and expungements as violations of state sovereignty and the Tenth Amendment. (That federalism is not seen as a barrier to the

central control of the system is a contradiction that reflects the relative power of those who bear the costs of the system. Regulation would burden law enforcement personnel, whereas the deleterious effects of central control affect only individual record subjects, many of whom are criminals.)

Law enforcement officials also have recourse to the ideal of comprehensiveness in crime control. Here, as in the push for central control, "computer madness" plays a part. Criminal justice is perpetually under the gun for its inability to capture and contain all wrongdoers. Although reality inevitably falls far short of the desired end of nabbing every wrongdoer, stakes are also high in pursuing the ideal since the alternative is crime without punishment and regulation without sanction. The computer's ability to store infinite amounts of information and to transfer it instantly symbolizes the quest for perfect efficiency. For the criminal justice official, regulating the collection and dissemination of data means depleting the raw material of a level of law enforcement effectiveness that has previously been only theoretical.

(The analogy of the "panoptic schema," which oppresses its subjects with the potential for surveillance as well as its actuality, is relevant here. The managers of the modern Panopticon have at least the option of using every bit of available information. The option of going beyond the symbolic to the operational level, however, is not exercised. Laudon found that two-fifths of the states do not use their criminal history systems much, suggesting that for many communities computerization may not be perceived as a practical way to fight everyday crime.)[73]

Those who fought for regulation—civil libertarians in Congress, scholars, ACLU lawyers—also used symbolic weapons. At first glance, their arsenal might appear to be even more compelling than that of system supporters, resting as it does on prevailing legal ideology in general and legal rules derived from widely accepted constitutional ideals in particular. But these concepts have limited value when competing with the symbols of security, efficiency, and state sovereignty that can be invoked today to support government coercion of individuals. Furthermore, proponents of the system can also have recourse to powerful legal symbols.

Consider the constitutional ideal of equal protection. Although it has been a powerful force for the preservation of human dignity in the face of state action, its application to the administration of justice has been limited to outlawing overt discrimination—making it difficult for prosecutors to exclude black jurors in trials of blacks, for instance—or to developing the right to participate in the criminal justice process—like ensuring adequate appellate review and the right to counsel.[74] Equal protection has not gone very far in

compensating for inequalities of condition among those who run afoul of the criminal law; it has been held not to require equal access to bail or consideration of a defendant's financial circumstances in sentencing, for example.[75] Even though it is clear that an overinclusive, inaccurate criminal records system is more likely to entrap low-income citizens, the constitutional concept of equal protection is unlikely to mitigate its effects.

Due process is not a very useful concept for the system's critics either. Lurking within it, in fact, is a justification for the breadth of access to criminal records. Fundamental procedural fairness requires that the state's power of compulsion be exercised within certain limits to protect people against governmental arbitrariness and excess. One limitation on official sanctions, which finds constitutional expression most directly in the right to trial guaranteed by the Sixth Amendment, is that they be imposed and recorded publicly.[76] With respect to warrants and criminal histories, this presumed requirement of publicity serves as powerful justification for unbridled data collection and for dissemination to employers and landlords, as well as to law enforcement agencies. Middle-level administrators in the state record repositories of California and New York interviewed on the application of state crime information policies repeatedly cited the public nature of the original records as justification for their collection and combination, even while they acknowledged that the totality of the picture of a subject's contracts with police, courts, and corrections systems has a qualitatively different impact from that of a contemporaneous record of arrest, charge, or conviction. Both a federal agency head and a Harvard professor stated in conversation with me that they did not see what the fuss was about since the data on individuals were all matters of public record.

Judicial interpretations of the right to privacy are generally consistent with this perspective. Although a few state and federal cases have prohibited the dissemination of incomplete records beyond criminal justice agencies, *Paul* v. *Davis*, the only Supreme Court case dealing with the use of arrest records, summarily rejected the record subject's allegations of a right to privacy.[77] After holding that a person's reputation is not a "liberty" or "property" interest sufficient to invoke the due process protections of the Fourteenth Amendment, then-Associate Justice William Rehnquist, writing for the majority, found that "none of our substantive privacy decisions" support the "claim that the State may not publicize a record of an official act such as an arrest."[78]

Another federal case illustrates the tendency of courts to favor law enforcement's efforts to be comprehensive over due process and privacy rights of individuals. *Menard* v. *Mitchell*, decided in 1971, found that the 50-year-

old statute authorizing the U.S. attorney general to collect and disseminate criminal records could not be stretched to permit the FBI to disseminate arrest records without convictions to employers outside the federal government. The court was nonetheless willing to allow criminal justice agencies to receive those records on the basis of the "compelling necessity" of data exchange in law enforcement and the administrative rulings that provide general FBI authorization for the collection and exchange of identification records.[79] With this case, as with the national criminal records system in general, a strong cultural value with respect to information (more is better) came together with a broad legal rule (the guilty must pay) to override the fundamental fairness concern that supplies the content of formal protections of individual rights. The FBI record would not be expunged, although it reflected a burglary charge that had been dropped because it could not be connected with "any felony or misdemeanor."[80] And it would continue to be available to law enforcement agencies nationwide and to federal employers.[81]

The arguments that provide legal justification for an inclusive, open records system—that it merely records public information and that it advances comprehensiveness in uncovering criminal conduct—have answers, of course. As Justice William J. Brennan said in his dissent in *Paul* v. *Davis*, it is basic constitutional doctrine that the government not "single an individual out for punishment outside the judicial process"; yet the criminal records system does just that.[82] The requirement of publicity for criminal records has been stood on its head to justify the Panopticon. Intended as a defense against state power, the rule is invoked to endorse its encroachment.

Perhaps that contradiction is the clue to the system's most fundamental significance, its place in a retreat from many welfare state initiatives of the past 50 years. Reconciling systems of automated recordkeeping for criminal justice with systematic protection of personal rights is not inconceivable; legal doctrine could easily accommodate both objectives. Although there is a way, however, it is not obvious that there is a will in the political climate of the 1980s.

Because the effects on individuals of the Panopticon are as yet either potential or unmeasured in any systematic way, it is easy to dismiss it as a minor civil liberties issue unrelated to structural problems. But the continuing extension of record checks goes beyond the right to be let alone or the right to speak up. Those who have records in the system—disproportionately poor and darker-skinned—run the risk of more or less permanent unemployability. As more employers, landlords, and insurers gain access to the system on a national basis, and as more investigative files are included within it, the system

may become a hidden stratifier of social and economic power, channeling many millions of Americans away from jobs and services because they have been arrested at some time for something other than a traffic offense. It is not so fanciful to worry about the emergence of a sophisticated computer quarantine that has profound implications for social structure.

To marshall sufficient political force to limit state power in this area, critics need to develop a much more precise and widely shared perception of the potential risks of emerging patterns of governmental coercion of individual behavior. What are the linkages between expanding systems of observation and control in the criminal justice system and in other dimensions of the state-citizen relationship, such as education and public assistance? What are the implications of computerized recordkeeping by the government beyond the relatively tangible risks for individual liberties? What barriers to a progressive crime information policy are posed by the character of the U.S. state, with its many centers of power? We are used to joking that "Big Brother is watching," but we have not yet adequately understood the mechanisms and potential impact of modern forms of state monitoring of individuals' lives. That work lies ahead.

NOTES

1. The 1971 figure comes from a statement by J. Edgar Hoover submitted to the Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, *Hearings on Federal Data Banks, Computers and the Bill of Rights* (92d Cong., Mar. 15, 1971). Current data on NCIC files are from a draft paper prepared in Oct. 1985 by the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee for the American Bar Association Section on Individual Rights and Responsibilities. The estimate of 1989 transactions is from "Testimony of David F. Nemecek at Hearing on Proposed Contract to Study and Redesign the National Crime Information Center Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary" (98th Cong., Aug. 1, 1984), 5.

2. "Statement of FBI Assistant Director Lawrence K. York Before the House Subcommittee on Civil and Constitutional Rights" (Mar. 24, 1986), 2. There is considerable overlap between records included in AIDS and those held or indexed in NCIC.

3. Bureau of Justice Statistics, "State Criminal Records Repositories" (U.S. Department of Justice, 1985), 1.

4. Ibid., 2. All ten of the most populous states, as determined by the 1980 census, have automated a portion of their records. All the states that have no plans for automating records, except Massachusetts and Indiana, are among the twenty least populous states. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986*, 106th ed. (Washington, D.C.: Superintendent of Documents, 1985).

5. I am greatly indebted to Kenneth C. Laudon's study of the dimensions and problems of the developing national criminal history system, *The Dossier Society: Value Choices in the Design of National Information Systems* (New York: Columbia

University Press, 1986). His discussion of non-criminal justice uses of criminal history data is in chaps. 5 and 9.

6. Ibid., 123.

7. Criminal records are of several types. In this article, examples of how the national criminal records system works are taken from experience with the hot files and criminal histories. In addition to individual records of official acts, law enforcement agencies maintain investigative files, which include data on people suspected of planning or committing crimes—identifiers, personal information on associations and activities, etc. As of mid-1986, it appeared that most investigative files either had not been automated or were not linked to computerized criminal histories or warrant files. (The principal exception is the NCIC's Secret Service Protective File, which contains leads on about a hundred people deemed to be a threat to the president and others whom the Secret Service is assigned to protect.) The significance of automating these files and connecting them to records of official acts should not, however, be overlooked. If requests for information in criminal history files flag investigative records, they, too, become part of the national system.

8. Neal Miller, *A Study of the Number of Persons with Records of Arrest or Conviction in the Labor Force* (U.S. Department of Labor, Technical Analysis Paper no. 63, 1979).

9. Laudon, *Dossier Society*, 309-13.

10. Although other Western democracies have some of the same problems with automated police files, many (Sweden, Great Britain, Canada, Germany) have agencies charged with oversight of computerized data systems, a proposal that has been rejected in the United States as antithetical to the federal system. See David Flaherty, "Protecting Privacy in Policy Information Systems," *University of Toronto Law Journal* 36 (Spring 1986): 116-48.

11. *Menard* v. *Mitchell*, 328 F. Supp. 718, 726 (1971).

12. Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, *Hearings on Federal Data Banks, Computers and the Bill of Rights* (92d Cong., Mar. 10, 1971), 649.

13. Section 812(b), Justice Assistance Act of 1984, P.L. 98-473.

14. Senate Committee on Government Operations, *Protecting Individual Privacy in Federal Gathering, Use and Disclosure of Information: Report to Accompany S.3418* (93d Cong., Sept. 26, 1974), 23.

15. See, e.g., House Subcommittee No. 4 of the Committee on the Judiciary, *Hearings on H.R. 13315* (92d Cong., Mar. 16, 22, and 23, Apr. 13 and 26, 1972); House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, *Hearings on H.R. 188, H.R. 9783, H.R. 12574 and H.R. 12575* (93d Cong., July 26, Aug. 2, Sept. 26, Oct. 11, 1973; Feb. 26 and 28, Mar. 5 and 28, and Apr. 3, 1974); House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, *Hearings on H.R. 8227* (94th Cong., July 14 and 17 and Sept. 5, 1975).

16. 28 Code of Federal Regulations, Section 20.

17. MITRE Corporation, "Implementing the Federal Privacy and Security Regulations" (McLean, Va., 1977).

18. SEARCH Group, Inc., *Compendium of State Privacy and Security Legislation* (U.S. Department of Justice, Bureau of Justice Statistics, 1985).

19. *Paul* v. *Davis*, 424 U.S. 693 (1976).

20. Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977).

21. David Burnham, *The Rise of the Computer State* (New York: Random House, 1983); Gordon Karl Zenk, *Project SEARCH: The Struggle for Control of Criminal Information in America* (Westport, Conn.; Greenwood Press, 1979).

22. Office of Technology Assessment, *An Assessment of Alternatives for a National Computerized Criminal History System* (Washington, D.C.: GPO, 1982).

23. See note 5.

24. Exchange between David Nemecek, NCIC section chief, and James Dempsey, assistant counsel, *FBI Authorization Hearings for FY 1986 Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee* (99th Cong., Apr. 25, 1985), 165-66.

25. Unless otherwise noted, material on state records systems comes from interviews conducted by the author (and internal documents collected at those interviews) with officials of record repositories in New York, California, and Massachusetts during the latter half of 1984.

26. "Agencies Authorized to Receive Criminal History Information," photocopied report of the Criminal Records Security Unit, California Department of Justice (1983).

27. 28 U.S.C., Section 534(a)(2).

28. SEARCH Group, Inc., *Criminal Justice Information Policy: Privacy and the Public Employer* (Washington, D.C.: Bureau of Justice Statistics, 1981), 48-49.

29. *Washington Post*, Feb. 15, 1986; U.S. Department of Transportation news release, Feb. 19, 1986.

30. H.R. 4759, S. 2477.

31. Interview with author, Nov. 1984.

32. See, e.g., anecdotes in the NCIC booklet, "The Investigative Tool: A Guide to the Use and Benefits of NCIC" (Washington, D.C.: Federal Bureau of Investigation, n.d.). Recent achievements are most often traceable to the new computers that compare fingerprint images found at the scene of a crime to prints on file.

33. "HRA/ACD Day Care/Head Start Program Fingerprinting and Criminal Record Review Report for the Month of October, 1985," photocopied (Human Resources Administration, City of New York), unpaginated.

34. Bureau of Justice Statistics, *Report to the Nation on Crime and Justice* (U.S. Department of Justice, Bureau of Justice Statistics, 1983.)

35. Several studies have found, not surprisingly, that an arrest record has a negative effect on employment opportunity. For the conclusion that arrest without conviction is an obstacle to employment, see Herbert S. Miller, "The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies" (U.S. Department of Labor, Manpower Administration Office of Research and Development, Report No. 81-09-70-02, 1972).

36. OTA, *Assessment of Alternatives*, 91-102.

37. *Central Valley* v. *Younger*, Sup. Ct. California, Co. of Alameda, Case Nos. 497394-6 and 524298-6 (1984).

38. Joan Petersilia, *Racial Disparities in the Criminal Justice System* (Santa Monica, Calif.: Rand Corporation, 1983).

39. See, e.g., *Jones* v. *New Orleans*, U.S. District Court, Eastern District of Louisiana, Civil Action No. 83-703 (1985); *Smith* v. *Gates*, Sup. Ct. California, Co.

of Los Angeles, Case No. CA 000619 (1984); *Emma* v. *Boston,* U.S. District Ct., Civil Action No. 85-3232-Y (1985).

40. *New York Times,* Aug. 25, 1985.

41. See, e.g., "California Agencies Got Spy Dossiers on Non-Criminal Groups from Chicago Police," *Los Angeles Times,* Dec. 6, 1984, pt. 1, p. 6.

42. Letter from FBI Director William H. Webster to Representative Don Edwards (D., Calif.), chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, Apr. 12, 1985.

43. Report of the Secretary's Advisory Committee on Automated Personal Data Systems, *Records, Computers and the Rights of Citizens* (Washington, D.C.: GPO, 1973), 19.

44. "Minutes, National Crime Information Center Advisory Policy Board, October 5-6, 1983" (unpublished FBI document).

45. *New York Times,* Jan. 1, 1984.

46. Testimony of D. Lowell Jensen, *Hearing on FBI Authorization Request for FY 1986 Before the Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary* (99th Cong., Apr. 25, 1985), 104.

47. "Agreements and Recommendations of the Attorney General's Bank Fraud Working Group," U.S. Department of Justice photocopied report (Apr. 2, 1985).

48. "Summary of the Rationale for Certain of the Matters Set Forth in the Attached Agreements and Recommendations of the Justice Department-Supervisory Agencies Working Group," U.S. Department of Justice photocopied report (Apr. 2, 1985), 3.

49. House Committee on Government Operations, *Federal Response to Criminal Misconduct and Insider Abuse in the Nation's Financial Associations* (98th Cong., 1984, H. Rept. 1137), 2.

50. Historical sources for this trend include Foucault, *Discipline and Punish;* and David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston: Little, Brown & Co., 1971.) A discussion of how modern "diversion" programs fit into the picture can be found in Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974), 9-12.

51. See Bureau of Justice Statistics, "Prisoners in 1985" (U.S. Department of Justice, Bureau of Justice Statistics, 1986); idem, "Probation and Parole, 1985" (U.S. Department of Justice, Bureau of Justice Statistics, 1986); idem, "Jail Inmates, 1984" (U.S. Department of Justice, Bureau of Justice Statistics, 1985).

52. James Q. Wilson, "Problems in the Creation of Adequate Criminal Justice Information Systems," in SEARCH Group, Inc., *Information Policy and Crime Control Strategies* (U.S. Department of Justice, Bureau of Justice Statistics, 1984), 8.

53. SEARCH Group, *Compendium.*

54. For a discussion of policy as "a course of action or inaction rather than specific decisions or actions," see H. Hugh Heclo, "Review Article: Policy Analysis," *British Journal of Political Science* 2 (Jan. 1972): 85.

55. Yehezkel Dror, *Public Policymaking Reexamined* (San Francisco: Chandler Publishing Co., 1968), chap. 2.

56. FBI Uniform Crime Reports, *Crime in the United States, 1970* (Washington, D.C.: Superintendent of Documents, 1970), 65.

57. Laudon, *Dossier Society,* 105.

58. FBI Uniform Crime Reports, *Crime in the United States, 1985* (Washington, D.C.: Superintendent of Documents, 1985), 41.

59. V. O. Key, *Public Opinion and American Democracy* (New York: Alfred A. Knopf, 1961), 32.

60. Edmund F. McGarrell and Timothy J. Flanagan, eds., *Sourcebook of Criminal Justice Statistics, 1984,* for U.S. Department of Justice, Bureau of Justice Statistics (Washington, D.C.: GPO, 1985), 187 (fig. 2.4), 188 (table 2.19), and 192 (table 2.23); Timothy J. Flanagan and Maureen McLeod, eds., *Sourcebook of Criminal Justice Statistics, 1982,* for U.S. Department of Justice, Bureau of Justice Statistics (Washington D.C.: GPO, 1983), 248 (table 2.40).

61. See Alan F. Westin, "Public and Group Attitudes Toward Information Policies and Boundaries for Criminal Justice," in SEARCH Group, *Information Policy,* 37.

62. Seymour Martin Lipset and William Schneider, *The Confidence Gap: Business, Labor and Government in the Public Mind* (New York: Free Press, 1983).

63. Samuel Walker, *Popular Justice: A History of American Criminal Justice* (New York: Oxford University Press, 1980), 127-238.

64. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: GPO, 1967).

65. The best account of agency competition for control of the computerized criminal history system is an unpublished history of LEAA by Mae Churchill and Harold Brackman, "The Hidden Agenda: LEAA and the Tools of Repression" (1980). See also Zenk, *Project SEARCH.*

66. James N. Danziger, William H. Dutton, Rob Kling, and Kenneth L. Kraemer, *Computers and Politics* (New York: Columbia University Press, 1982), 19, 163-68, 188-93.

67. Graham T. Allison, *The Essence of Decision* (Boston: Little, Brown & Co., 1971), 85.

68. Murray Edelman, *The Symbolic Uses of Politics* (Urbana: University of Illinois Press, 1964).

69. Ibid., 19.

70. Ibid., 69-71.

71. Albert J. Reiss, Jr., *The Police and the Public* (New Haven: Yale University Press, 1971).

72. Laudon, *Dossier Society,* 233.

73. Ibid., 97.

74. *Batson* v. *Kentucky,* U.S. Supreme Court, No. 84-6263, decided Apr. 30, 1986.

75. *Burns* v. *Ohio,* 360 U.S. 258 (1959); *Douglas* v. *California,* 372 U.S. 353 (1963); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

76. In re *Oliver,* 333 U.S. 257 (1948).

77. 424 U.S. 694 (1976).

78. Ibid., at 713.

79. *Menard* v. *Mitchell,* 328 F. Supp. 718 (1971). The restriction on dissemination was later nullified by federal legislation.

80. Ibid., at 720.

81. In 1974 the record subject sued to have his record expunged, on the basis that the arrest had been downgraded to a detention, and won. *Menard* v. *Saxbe,* 498 F. 2d 1017 (1974). The other outcome of the 1971 case was that Congress immediately authorized the FBI to release arrest information for employment purposes where authorized by state law.

82. *Paul* v. *Davis,* at 735, n. 18 (J. Brennan, dissenting).